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Nos. 09-533 and 09-547

IN THE
Supreme Court of the United States

CROPLIFE AMERICA, ET AL., PETITIONERS

v.

BAYKEEPER, ET AL.

AMERICAN FARM BUREAU FEDERATION, ET AL., PETITIONERS

v.

BAYKEEPER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Sixth Circuit erred in concluding that the "plain language" of the Clean Water Act unambiguously prohibits an Environmental Protection Agency ("EPA") rule that, consistent with more than 35 years of agency practice, provides that the application of a federally approved pesticide to or over water for its intended purpose and in accordance with the requirements of the EPA's pesticide regulatory program is not a "discharge of a pollutant."

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are a bipartisan group of Members of Congress with a strong interest in the implementation

[1] Pursuant to Rule 37.6, no counsel for any party authored this brief, in whole or part, and no counsel for a party or party made a monetary contribution to fund the preparation or submission of this brief. No entity or person, aside from the *amici curiae* and their counsel, made any monetary contribution for the preparation or submission of this brief. Counsel of record for the parties received timely notice of the intent to file this brief, and their letters consenting to the filing of this brief have been filed with the Clerk.

and interpretation of the Clean Water Act ("CWA") and the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). Senator James M. Inhofe is the Ranking Member, and Senators Christopher S. Bond and David Vitter are members, of the Senate Committee on Environment and Public Works. Representative John L. Mica is the Ranking Member, and Representative Howard Coble is a member, of the House Committee on Transportation and Infrastructure. Representative John Boozman is the Ranking Member on the Water Resources and Environment Subcommittee of the House Committee on Transportation and Infrastructure. These committees (and subcommittee) have jurisdiction over water pollution and other issues related to the CWA. Senators Mike Johanns and E. Benjamin Nelson are members of the Senate Committee on Agriculture, Nutrition and Forestry, which has jurisdiction over issues relating to FIFRA. Representative Frank D. Lucas is Ranking Member, and Representatives Dennis A. Cardoza, Travis W. Childers, K. Michael Conaway, Lincoln Davis, Larry Kissell, Blaine Luetkemeyer, Cynthia M. Lummis, Eric J.J. Massa, Mike McIntyre, Randy Neugebauer, David P. Roe, and Kurt Schrader are members, of the House Committee on Agriculture, which has jurisdiction over issues relating to FIFRA. Representatives Leonard L. Boswell, Sam Graves, and Betsy Markey are members of both the House Transportation and Infrastructure and Agriculture Committees. Representatives Marion Berry, F. Allen Boyd, Jr., Lincoln Davis, Jo Ann Emerson, Jack Kingston, and John T. Salazar are members of the House Committee on Appropriations, which has jurisdiction over matters relating to revenue and expenditures of all federal programs, including those under the CWA and FIFRA. Representatives Roy

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* Senators Blanche Lincoln and Saxby Chambliss, the Chairman and Ranking Member of the Senate Committee on Agriculture, Nutrition, and Forestry, also join this brief.

Blunt, Jeff Flake, Wally Herger, Lynn Jenkins, Walter B. Jones, Jr., Doug Lamborn, Sue Myrick, and Mike Ross represent districts with strong interests in agriculture, pesticide use, and pest control.

The Sixth Circuit's decision implicates important concerns involving environmental protection, public health, and economic growth. *Amici* have a strong interest in preserving the traditional understanding of the relationship between the CWA and FIFRA, which appropriately balances these objectives, and which was embodied in the Environmental Protection Agency ("EPA") rule invalidated by the Sixth Circuit. *Amici* also have an interest in preserving the role Congress originally created for the EPA under the CWA, which would allow the agency to bring its expertise to bear in interpreting and implementing its ambiguous terms. Finally, *amici* have a strong interest in protecting their constituents who apply pesticides in accordance with FIFRA from unreasonable legal liability, and in protecting their constituents from the many harms threatened by the Sixth Circuit's unreasonable restrictions on pesticide use.

REASONS FOR GRANTING THE PETITIONS

Since the CWA's enactment in 1972, the EPA has never required a National Pollutant Discharge Elimination System ("NPDES") permit for the application of FIFRA-registered pesticides to or over the waters of the United States. After notice and two rounds of public comment, the EPA formally promulgated a rule (the "EPA Rule"), 71 Fed. Reg. 68,483 (Nov. 27, 2006) (reproduced at Pet. App. 68a-111a[2]), that "codified what had been EPA's practice during the more than 35 years EPA has administered the

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[2] References to "Pet. App." are to the petitioners' appendix in *American Farm Bureau Federation v. Baykeeper*, No. 09-547.

Clean Water Act," EPA Mot. for Stay of Mandate at 9 (reproduced at Pet. App. 122a). For the reasons set forth below, the Sixth Circuit's holding that the CWA *unequivocally prohibits* the EPA Rule—and, by implication, that it *unequivocally mandates* treating FIFRA-registered pesticides used for their approved purpose as "waste," even when applied under conditions that EPA has found to be consistent with preventing "unreasonable adverse effects on the environment," 7 U.S.C. § 136a(c)(5)(C)—urgently warrants review.

A. The Sixth Circuit Has Substituted Its Deeply Flawed Reading Of The Clean Water Act For That Of The Expert Agency

Amici would not be filing this brief if this were a close case. This is not an instance where the court of appeals carefully analyzed an administrative rule under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and mistakenly, but reasonably, concluded that the rule was not entitled to deference. Indeed, the Sixth Circuit's reading is sufficiently unreasonable that it can be understood only as that court substituting its judgment for that of the expert agency charged with implementation of the statute, contrary to the clear intent of Congress.

1. *Meaning of "Chemical Waste."* The Sixth Circuit held that the CWA's term "chemical waste," 33 U.S.C. § 1362(6), unambiguously includes FIFRA-approved chemical pesticides that leave some residue after serving their "beneficial purpose," Pet. App. 19a, even where applied to control pests consistent with labeling EPA has found sufficient to prevent environmental harm, and even where the applicator is unaware of (and does not intend to dispose of) any residue. The court acknowledged that the term

"chemical waste" ordinarily means "discarded," "superfluous," or "refuse or excess" chemicals. *Id.* at 17a-18a. The court nonetheless concluded that although such pesticides are not "discarded" or "refuse" at the time of application, they are "waste" if residue remains after the pesticide has served its purpose. *Id.* Because "virtually all applications of chemical pesticides leave * * * residu[e]," under the Sixth Circuit's holding, "almost all applications of chemical pesticides to, over, or near waters will now require NPDES permits." Pet. App. 121a.

The conclusion that a beneficial product, which EPA itself carefully regulates under a detailed regime that explicitly considers effects on water quality and the environment, *see* 7 U.S.C. § 136a(c)(5), is "waste" *at the time it is used for its intended purpose*, is facially suspect. As the Second Circuit concluded, "pesticides are not being discarded when sprayed * * * with the design of effecting their intended purpose." *No Spray Coalition v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001) (per curiam). And, nearly four months *after* the Sixth Circuit's decision in this case, this Court concluded in *Burlington Northern & Santa Fe Ry. v. United States*, 129 S. Ct. 1870, 1880 (2009), that a company was not liable under the Comprehensive Environmental Response, Compensation, and Liability Act for "arrang[ing] the disposal" of a hazardous substance because it did not intend to "dispose" of the pesticide at the time some spilled during commercial distribution.

To reach its patently mistaken conclusion, the Sixth Circuit disregarded several bedrock principles of statutory construction.

a. First, the court plainly disregarded its obligation to consider the definition of "pollutant" in the context of the regulatory scheme. "In making the threshold determination under *Chevron*" whether a statute is ambiguous, "'a reviewing court should not confine itself to examining a particular statutory provision in isolation,'" but rather must interpret the provisions "'in context.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). Although the court gave lip service to the notion that the meaning of language must be determined in the context of the statute as a whole, Pet. App. 16a, it considered the words "chemical waste" in isolation. *See id.* at 17a-20a.

The court failed to consider what section 104(*l*) of the CWA, the sole provision that specifically refers to the effects of pesticides on water quality, indicates about whether using approved pesticides to control pests constitutes the sort of pollutant discharge that the CWA's National Pollutant Discharge Elimination System seeks to "eliminate." That provision does not classify pesticides as "pollutants"; rather, it requires studying "methods to control the release of pesticides into the environment [including] examination of the persistency of pesticides in the water environment," and calls for the President to report the results of that study to Congress together with "recommendations for any necessary legislation." 33 U.S.C. § 1254(*l*). That language does not suggest an intent to *eliminate* the application of pesticides to water. Indeed, the Act's legislative history indicates that "[t]he use of pesticides * * * will undoubtedly retain a high level of importance in agriculture for the foreseeable future" because "[p]esticides provide substan-

tial benefits to mankind by protecting plants and animals from pest losses." S. Rep. No. 92-414, at 92 (1971) (supplemental views of Sen. Dole), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3760. The legislative history suggests that residue from pesticides is to be addressed not through the NPDES system, but through the regulation of *nonpoint* sources. *See, e.g.*, H.R. Rep. No. 92-911, at 1275 (1972); *id.* at 1293-94 (stating that "[a]gricutural pollution control" concerns, among other things, "[p]esticides, fungicides, and herbicides," and that "[m]ost of the problems of agricultural pollution deal with * * * nonpoint sources"; noting that efforts under FIFRA "are paying off in securing registration and adherence to recommended usages"); *id.* at 1298.

b. Moreover, the Sixth Circuit failed to consider the meaning of "pollutant" and "chemical waste" in light of other federal regulatory efforts, particularly the system Congress specifically established decades before the CWA to regulate pesticide use, FIFRA. *See* Pub. L. No. 80-104, ch. 125, 61 Stat. 163 (1947). "When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) * * * .'" *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1856)). It is important to consider a provision in light of the entire regulatory structure, because "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *Brown & Williamson*, 529 U.S. at 133. Although the Sixth Circuit noted the FIFRA regulatory scheme in passing at the beginning of its opinion, *see* Pet. App.

5a, it failed to consider its parallel regulatory scheme as relevant context in interpreting the CWA. That was error.

At the time that Congress took up the legislation that became the CWA, FIFRA required the registration of all pesticides that moved in interstate commerce and required all registered pesticides to bear a warning label bearing directions "adequate to prevent injury to living man and other vertebrate animals, vegetation, and useful invertebrate animals." 7 U.S.C. §§ 135(z)(2)(d) (1970), 135a(a)(5) (1970); *see also id.* § 135(z)(2)(g) (1970). As relevant here, FIFRA provided that the EPA Administrator would register a pesticide if "its labeling and other material required to be submitted" were sufficient, *id.* § 135b(b) (1970), to "prevent injury to * * * vertebrate animals * * * and useful invertebrate animals." *Id.* § 135(z)(2)(d).

Three days after enacting the CWA, Congress enacted comprehensive revisions to FIFRA. As amended, FIFRA continues to require that any pesticide sold in the United States must first be registered with the EPA. *See* 7 U.S.C. §§ 136 *et seq.* EPA may approve a pesticide only after it has made a detailed empirical assessment of its potential adverse environmental impacts, including specifically those "on aquatic resources (*e.g.*, fish, invertebrates, plants, and other species in fresh water, estuarine, and marine environments)," Pet. App. 93a, and the agency has imposed any restrictions on its use that are necessary to prevent "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c). The statute does not require users to seek government authorization before applying a registered pesticide. Rather, necessary restrictions are reproduced on the pesticide

label, and users must comply with those restrictions in applying the pesticide or risk liability. *See* 7 U.S.C. § 136j(a)(2)(G).

It seems extraordinarily unlikely that Congress intended, through the CWA's use of the general term "chemical waste," to sweep into the NPDES program the application of pesticides that were already subject to comprehensive regulation under legislation specifically governing pesticide use, even when applied subject to restrictions that EPA had found sufficient to prevent "unreasonable adverse effects on the environment." At a minimum, one would expect Congress to speak clearly before subjecting such conduct to an additional layer of regulation. "Congress * * * does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001); *cf. Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153-54 (1976) (absent "clear intention otherwise," "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum").

In this regard, the Sixth Circuit's conclusion conflicts with this Court's decision in *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976), which involved a neighboring term in the very same definition of "pollutant" at issue here. *See* 33 U.S.C. § 1362(6) (Supp. IV 1975). There, the court of appeals had held that the general term "radioactive materials" was "plain and unambiguous" in its sweep, and unequivocally encompassed "*all* radioactive materials," including source, byproduct, and special nuclear materials that had long been regulated under the Atomic Energy Act. Thus, it held that those nuclear materials were "pollutants" under the Federal

Water Pollution Control Act ("FWPCA"), as the CWA was then known. This Court reversed, holding that it was "abundantly clear" that Congress had not "intended the Act to encompass" those materials, reasoning that "[t]o have included these materials under the [Act] would have marked a significant alteration of the pervasive regulatory scheme embodied in the [Atomic Energy Act]." 426 U.S. at 23-24. Absent a "clear indication of legislative intent," the Court would not read the FWPCA's general language to have "significant[ly] alter[ed]" the regulatory landscape. *Id.* at 24. *Train* compels the conclusion that Congress did not, through the CWA's use of the general term "chemical waste," intend to substantially alter the regulatory regime by requiring users to obtain an NPDES permit before applying federally registered pesticides to or over water in accordance with their labels.

2. *Meaning of "Biological Materials."* The Sixth Circuit likewise erred in concluding that "'biological materials' cannot be read to exclude biological pesticides or their residuals," Pet. App. 21a, thus subjecting all biological pesticides to NPDES permitting, regardless of whether they leave residue after their use is complete. *Id.* at 121a. Under *Train*, the use of the general term "biological materials" is insufficient to indicate that Congress intended to sweep within the NPDES program pesticides that were already subject to exacting environmental regulation under FIFRA. *See* pp. 9-10, *supra*. It is evident from the face of the statute that the term is not meant to include "biological materials" of whatever kind, a reading that, as the EPA noted, "could arguably mean that activities such as fishing with bait would constitute the addition of a pollutant." Interim Statement and Guidance

on Application of Pesticides to Waters of the United States in Compliance with FIFRA, 68 Fed. Reg. 48,385, 48,388 (Aug. 13, 2003). The Ninth Circuit thus has concluded that the "the statute is ambiguous on whether 'biological materials' means *all* biological matter * * * or whether the term is limited to biological materials that are a waste product of some human process." *Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1016 (9th Cir. 2002).

While the term "materials" in the abstract is broader than "wastes," it is "unlikely that Congress intended to include biological pesticides * * * [as] pollutants, while chemical pesticides used in the same circumstances" would not be. Pet. App. 83a. The different language simply reflects the fact that biological pesticides were uncommon in 1972 and thus were not the focus of the definition. As EPA noted in promulgating the Rule, "[s]ince biologically and chemically based pesticides * * * are both EPA-evaluated products, treating them differently under the Clean Water Act is not warranted." *Id.* Moreover, because "biological pesticides in use today are generally reduced-risk products, * * * it would not make sense, and would be inconsistent with the goals of the Clean Water Act, to discourage the[ir] use * * *." *Id.*

3. The Sixth Circuit also failed to consider the expert agency's longstanding practice in determining the meaning of the words "chemical waste" or "biological materials." The very first words in the EPA's brief before the Sixth Circuit set forth the agency's long-held position:

> Since the enactment of the Clean Water Act in 1972, EPA has not required persons applying

> pesticides directly to or over waters of the United States for the purpose of controlling pests in or over those waters to obtain a Clean Water Act [NPDES] permit. This position reflected a general understanding that Congress did not intend to regulate under the Clean Water Act properly applied pesticides to control pests in or over waters when those pesticides had been approved by EPA for such use under [FIFRA] regulations.

EPA Br. at 3, *National Cotton Council of Am. v. EPA*, No. 06-4630; *accord* Pet. App. 73a (EPA Rule). Although the agency clearly apprised the Sixth Circuit of its contemporaneous and longstanding interpretation, the court did not so much as mention it in reaching its conclusion.[3]

An agency's contemporaneous and consistently maintained interpretation of a statute is "[o]f particular relevance" in construing its meaning, "which 'we have allowed . . . to carry the day against doubts that might exist from a reading of the bare words of a statute.'" *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993) (quoting *FHA v. Darlington,*

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[3] The court *did* note an agency statement that pesticides could not be "'discharge[d] into lakes, streams, ponds, or public waters unless in accordance with an NPDES permit.'" Pet. App. 6a (quoting EPA, Policy and Criteria Notice 2180.1 (1977)). That policy statement, however, involves *waste effluent* discharges that may contain a pesticide, not the application of pesticides to control pests. *See generally* EPA, Office of Prevention, Pesticides, and Toxic Substances, Pesticide Regulation Notice 93-10 re: Effluent Discharge Labeling Statements (July 29, 1993), *available at* http://www.epa.gov/PR_Notices/pr93-10.pdf. The quoted policy statement is consistent with the EPA Rule, which itself noted that a "pesticide may become a 'pollutant' at a later time (*e.g.*, after the pesticide product has served its intended purpose)." Pet. App. 87a.

Inc., 358 U.S. 84, 90 (1958)). Particularly where, as here, the agency was involved in developing the legislation in question, such a construction represents the considered view of those in the agency whom Congress "'charged with responsibility of setting its machinery in motion.'" *Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984) (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). "While not conclusive, it surely tends to show that the EPA's current practice is a reasonable and hence legitimate exercise of its discretion * * * that the agency has been proceeding in essentially this fashion for over 30 years." *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1509 (2009).

Moreover, it is significant that Congress has not seen fit to modify the statute during the intervening 37 years. "Congress is presumed to be aware of an administrative * * * interpretation of a statute," and "when it reenacts a statute without change," it is an indication that the agency has correctly determined Congress's intent. *Lindahl v. OPM*, 470 U.S. 768, 782 n.15 (1985). Since 1972, Congress has twice made major amendments to the NPDES program,[4] and on other occasions it has made minor changes to it.[5] But at no time has Congress seen fit to amend the statute to require EPA to control the application of pesticides through the NPDES program. Under

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[4] *See* Clean Water Act of 1977, Pub. L. No. 95-217, §§ 33(c), 54(c)(1), 65, 66, 91 Stat. 1566, 1577, 1591, 1599, 1600; Water Quality Act of 1987, Pub. L. No. 100-4, tit. IV, §§ 401-04(a), (c), (d), 405, 101 Stat. 7, 65-69.

[5] *See* Water Resource Development Act of 1992, Pub. L. No. 102-580, tit. III, § 364, 106 Stat. 4797, 4862; Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 1(a)(4), App. D, Div. B, tit. I, § 112, 114 Stat. 2763, 2763A-224 (2000).

this Court's precedents, that is a compelling indication that EPA has correctly interpreted Congress's intent. *See United States v. Rutherford*, 442 U.S. 544, 553-54 (1979) (holding that Congress's failure to overrule the FDA's decision not to make an exception for drug licensing for drugs used by the terminally ill reflects Congress's ratification of that position). "In the [37] years during which" the EPA has taken this consistent interpretation, "Congress has never expressed its disapproval, and its silence in this regard suggests its consent to the [EPA's] practice." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981).

4. The most natural reading of the CWA, in light of all traditional tools of statutory construction, is the one embodied by the EPA Rule: the Clean Water Act's NPDES permit requirement does not encompass the application of FIFRA-registered pesticides to or over water in accordance with labeling restrictions. But at a minimum, it cannot be said that the opposite conclusion is *compelled* by the text of the statute.

B. The Sixth Circuit's Decision Will Have Grave Practical Consequences

1. Review is also warranted because of the breathtaking practical consequences the Sixth Circuit's decision will have. The EPA's analysis suggests that the Sixth Circuit's judgment likely will result in the *single greatest expansion* in the history of the NPDES program, resulting in approximately 5.6 million covered pesticide applications per year by 365,000 applicators. Pet. App. 124a. That figure is vastly greater than the current number of facilities authorized to discharge under individual permits (45,700), the number of facilities authorized for non-storm water

discharges under general permits (120,000), the number of industrial storm-water point sources (96,500), and even the number of storm water point sources associated with construction (250,000). Pet. App. 141a-142a. The current number of NPDES permittees is 411,470 facilities. *Id.* at 142a. Thus, in a single stroke, the Sixth Circuit's decision virtually *doubles* the number of entities subject to NPDES permitting.

It provides little comfort that the EPA "*believes it* can conform *its* conduct to comply with the [Sixth Circuit's] decision." EPA Response to Petition for Rehearing En Banc 2 (filed June 3, 2009) (emphasis added). Even assuming that the EPA's predictions about its ability to create a general permitting scheme are borne out, the EPA's compliance represents just a small fraction of the total cost of the Sixth Circuit's exorbitant mandate. *Forty-five* states, many of them already under severe budgetary pressure, face the daunting administrative task of developing and issuing general permits to implement the Sixth Circuit's decision.

2. The Sixth Circuit's decision also imposes tremendous burdens on pesticide users. It will increase by orders of magnitude the difficulty and cost for pesticide applicators to comply with the law. For small applicators, many of whom can ill afford expert environmental counsel, efforts at compliance will go from a simple matter of following instructions on a pesticide label to the vastly more complex process of identifying the relevant general permit, filing with the regulatory authority a valid notice of intent to comply with the general permit, *see* 40 C.F.R. § 122.28(b)(2)(i) (2008), and complying with all the permit's conditions and restrictions.

Completing a notice of intent alone can be complicated and time-consuming. While we understand that EPA has not yet finalized the requirements of general permits governing aquatic pesticide application, the following excerpts of general permit applications illustrate the often exacting requirements of notices of intent:

For the discharge described * * *, please provide concentrations of the following parameters ["Total Suspended Solids," "Oil and Grease," "pH (give high and low in range)," and "Surfactants"] and indicate whether the data is based on actual sampling results or, if estimated, a source of the estimated value. Data must be representative of the facility's current operation. The average daily value is typically based on an average of the last 365 days of data.[6]

- [Provide] [a] stormwater management program (SWMP), including best management practices (BMPs) that will be implemented and the measurable goals for each of the stormwater minimum control measures specified in Part V, Section B. [of this application], [and] the month and year in which the applicant will start and fully implement each of the minimum control measures or the frequency of the action * * *.[7]

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[6] S.C. Dep't of Health and Envtl. Control, Notice of Intent NPDES General Permit for Vehicle Wash Water Discharges SCG750000 at 2 (2002), *available at* http://www.scdhec.gov/administration/library/D-3756.pdf.

[7] Water Quality Div., Ariz. Dep't of Envtl. Quality, Arizona Pollutant Discharge Elimination System, General Permit for Discharge from Small Municipal Separate Storm Sewer Systems to Waters of the United States at 8 (2002), *available at*

- Provide an estimated start date the discharge did or is to commence, the name(s) of the receiving water(s), and check compliance conditions. *All applicable compliance conditions listed must be met for the Notice of Intent to be considered complete.*

  * * * *

  Provide the name(s) of the receiving water(s) to the first uniquely named river. Explain to where the storm water runoff will drain (e.g., unnamed waterway to road ditch to unnamed tributary to Mud Creek to Skunk River).[8]

The administrative burden of complying with general permits is illustrated by looking to general permits for aquatic pesticide use in the State of Washington, which began issuing such permits in 2002. *See* Pet. App. 4a. Washington has three general permits for pesticides involving aquatic plants and one for mosquito control. *See* Washington State Governor's Office of Regulatory Assistance, Environmental Permit Handbook, NPDES Aquatic Pesticides General Permit, *available at* http://apps.ecy.wa.gov/permithandbook/permitdetail.asp?id=99 (last visited Dec. 3, 2009). Applicators seeking to control aquatic plants must first determine which of three permit programs applies and then submit an application. The permits range in length from 22 to 71 pages with

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http://www.azdeq.gov/environ/water/permits/download/ms4small.pdf.

[8] Iowa Dep't of Natural Res., How to File a Complete Notice of Intent for NPDES General Permit at 2 (2007), *available at* http://www.iowadnr.gov/water/stormwater/forms/how_noi.pdf (emphasis added).

appendices. Even the permit most likely to apply to farmers (the irrigation system aquatic weed control permit, *see* Irrigation System Aquatic Weed Control National Pollutant Discharge Elimination System and State Waste Discharge General Permit (Feb. 20, 2008), *available at* http://www.ecy.wa.gov/programs/wq/pesticides/irrigation/permit-irrig_district-final.pdf) entails a significant administrative burden, imposing detailed monitoring requirements, *see id.* at 8-11, public notice requirements, *id.* at 12-13, and recordkeeping requirements, *id.* at 13-15, and requires submission of both an "Integrated Vegetation Management Plan" and a "spill control plan." *Id.* at 11.

3. In addition, even a general permit scheme presents a substantial risk of litigation and ruinous fines. Efforts at full compliance with the planned general permit scheme are bound to fall short in some respects "[g]iven that most applicators will not have ever been subject to an NPDES permit." Pet. App. 159a (decl. of James A. Hanlon, Dir., Office of Wastewater Management, Office of Water, EPA (Apr. 8, 2009)). Applicators face fines of up to $37,500 *per day per violation*, plus attorney's fees. *See* 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4 (2008); 33 U.S.C. § 1365(d). While the EPA may refrain from prosecuting the enormous class of newly minted NPDES permittees, there is every reason to believe that permittees' efforts at compliance will be subject to exacting scrutiny and perceived shortcomings will promptly become the subject of citizen suits. As the EPA noted below, in just weeks after the Sixth Circuit's decision, dozens of notices of intent to sue were filed involving mosquito spraying programs alone. Pet. App. 188a-189a. Those are likely the harbinger of many more lawsuits. Unless this Court acts, hundreds of thou-

sands of small applicators and "farmers will go into the next growing season under the threat of lawsuits." Nat'l Ass'n of State Dep'ts of Agric., NPDES Permits for Pesticide Applications Near Water (Sept. 28, 2009), *available at* http://www.nasda.org/File.aspx?id=24468.

4. The Sixth Circuit decision could have grave implications for public health. While not as time-consuming as individual permit systems, even a general permit scheme can result in significant delays, increased costs of compliance can divert resources from pest control, and litigation risks can deter and delay pest-control efforts. The combination could seriously undermine pest-control efforts that are critical to public health, particularly the control of mosquitoes. "[M]osquito-borne illnesses continue to pose significant risks to parts of the population in the United States." EPA & U.S. Centers for Disease Control & Prevention, Joint Statement on Mosquito Control in the U.S. (Apr. 10, 2007), *available at* http://www.epa.gov/pesticides/health/mosquitoes/mosquitojoint.htm. "Disease carrying mosquito species are found throughout the U.S.," *id.*, spreading West Nile virus, encephalitis, Dengue fever, and other serious diseases. Because pesticide use is an essential part of mosquito control efforts, if delays, increased expense, and litigation significantly curtail mosquito control efforts, the consequences could be deadly.

The Sixth Circuit's decision likewise could have serious effects on agriculture. The delays inherent in general permit schemes make them ill suited for many pest-control efforts, which require rapid responses to changing conditions.

> [P]est problems can develop quickly and require a prompt response. Failure to apply a pesticide

> soon after a pest is first detected could result in recurring and greater pest damage in subsequent years if a prolific insect were to become established in * * * plant hosts. Fungal spores such as soybean rust can move hundreds of miles in a few days' time via the wind * * *.

Pet. App. 167a (decl. of Teung F. Chin, Acting Director, Agricultural Research Service, Office of Pest Management Policy, U.S. Dep't of Agric. (Apr. 7, 2009)). Many family farmers and other small applicators lack the resources necessary to comply with a detailed permit scheme. Delays thus could cripple American farmers' emergency pest control efforts and impede their ability to respond quickly to new infestations. *Cf.* Pet. App. 164a-165a; *id.* at 203a (discussing individual permits). As Secretary of Agriculture Thomas J. Vilsack observed earlier this year, "a permitting system * * * is ill-suited to the demands of agricultural production." *Id.* at 203a.

5. Finally, the Sixth Circuit's deeply flawed decision may result in even more widespread liability because of its understanding of what constitutes the discharge of a pollutant *from* a point source. The Sixth Circuit concluded that excess pesticide and residue is waste from a "point source" although it was a useful product at the time it left the nozzle and only became waste later. Pet. App. 27a. The Sixth Circuit thereby concluded that something that would not ordinarily be deemed "waste" at the time and location of its release would nonetheless require a NPDES permit if it becomes "waste" at some point in the indeterminate future. That conclusion could have wide-ranging ramifications, and could lead to citizen suits seeking to require NPDES permits for tailpipe and smokestack emissions that may eventually enter

a water body as air deposition (although they are already subject to regulation under the Clean Air Act), for the dispensing of road salt, for the application of domestic fertilizers, and for the use of many other everyday products that have never before been subject to NPDES permitting. The Sixth Circuit's conclusion was a necessary step in its reasoning to support the judgment, and it is likely that litigants will use it in seeking to expand the scope of NPDES permitting into areas and activities not intended by Congress.

C. Review Is Warranted Now Regardless Of Whether EPA Plans To Maintain The Rule

Powerful institutional considerations favor review by this Court, regardless of whether the new Administration wishes to maintain the Rule. Given the tremendous practical importance of the Rule, review of the Sixth Circuit's deeply flawed decision is certainly warranted if the EPA wishes to retain it. But even if EPA may wish to depart from its longstanding practice, review is warranted so the agency can revisit its decision through traditional administrative procedures, without reliance on a transparently flawed circuit-court opinion. *See generally Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). The Sixth Circuit's holding that the terms "chemical waste" and "biological waste" are unambiguous has significantly curtailed the EPA's regulatory discretion with respect to an extraordinarily broad range of products. *See* Pet. App. 121a. Unless the Sixth Circuit's unreasonable construction of the CWA is vacated, its holding that those terms are "unambiguous" will have a distorting influence on any future rulemaking the EPA may wish to conduct in this area. *See, e.g., Nat'l Cable & Telecomms.*

Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) ("[a] court's prior judicial construction of a statute trumps an agency construction * * * if [it] holds that its construction follows from the unambiguous terms of the statute").

Even if the EPA favored the adoption of a general permit scheme for aquatic pesticides as a policy matter, such a significant change should be made through rulemaking, rather than the shortcut of relying on the Sixth Circuit's flawed decision. An agency is "require[d]" to "provide reasoned explanation for its action," *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009), and notice and comment rulemaking ensures "a measure of public accountability in[] administrative practices." *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990). It would ill serve interests in regulatory accountability to permit EPA regulations to be effectively amended without notice and comment by acquiescence in the Sixth Circuit's unreasonable construction of the statute. *Cf. Fox Television Stations*, 129 S. Ct. at 1811 ("An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."); *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 995 (D.C. Cir. 2005) (an agency cannot "'evade notice and comment requirements by amending a rule under the guise of reinterpreting it'") (quoting *Molycorp, Inc. v. EPA*, 197 F.3d 543, 546 (D.C. Cir. 1999)).

Finally, there is no warrant for denying certiorari to permit further development of the law in the courts of appeals. As noted above and in the petitions, Pet. 16-21, *CropLife America v. Baykeeper*, No. 09-533; Pet. 35-36, *American Farm Bureau Federation v. Baykeeper*, No. 09-547, the Sixth Circuit's de-

cision conflicts with decisions of this Court and other courts of appeals. Moreover, because challenges to the EPA's rule from eleven circuits were consolidated in the Sixth Circuit, *see* Pet. App. 8a, the decision below constitutes the sole judicial review that the EPA Rule will receive. As this Court has noted in the analogous context of courts of exclusive jurisdiction, under such circumstances, "the rule that [the court of appeals] applied in this case * * * is a matter of special importance to the entire Nation" warranting immediate review. *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 89 (1993).

CONCLUSION

For the reasons stated above, the petitions for a writ of certiorari should be granted. Alternatively, this Court should grant, vacate, and remand for further consideration in light of the intervening decision in *Burlington Northern*.

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